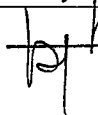


RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 AUG 29 A 11: 34

NO. 80245-9

BY RONALD R. CARPENTER


CLERK

SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN HENDRICKSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner, Presiding Judge

No. 04-1-04088-6

Supplemental Brief of Respondent

GERALD A. HORNE
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
1.	Does the trial court have discretion to use a nunc pro tunc order to amend an order of dismissal when the parties are in agreement as to the intent of the original order?	1
B.	<u>STATEMENT OF THE CASE</u>	1
C.	<u>ARGUMENT</u>	6
1.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN USING A NUNC PRO TUNC ORDER TO AMEND AN ORDER OF DISMISSAL WHERE THERE WAS NO DISPUTE AMONG THE PARTIES AS TO THE INTENT OF THE ORIGINAL ORDER.....	6
D.	<u>CONCLUSION</u>	8

Table of Authorities

State Cases

<i>In re Marriage of Pratt</i> , 32 Wn. App. 665, 667, 649 P.2d 141 (1982) ..6, 7	
<i>State v. Petrich</i> , 94 Wn.2d 291, 296, 616 P.2d 1219 (1980).....6	
<i>State v. Rosenbaum</i> , 56 Wn. App. 407, 410, 784 P.2d 166 (1989).....6	
<i>State v. Smissaert</i> , 103 Wn.2d 636, 640, 694 P.2d 654 (1985).....6	

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does the trial court have discretion to use a nunc pro tunc order to amend an order of dismissal when the parties are in agreement as to the intent of the original order?

B. STATEMENT OF THE CASE.

The substantive facts of the case are not presented in this brief as they do not pertain to the narrow issue before this court.

On August 24, 2004, Kevin Hendrickson, hereinafter defendant, was charged with one count of possessing stolen property in the first degree relating to a stolen trailer. CP 1-2. On August 18, 2005, the State amended the charges to include 15 counts of identity theft in the second degree and one count of unlawful possession of fictitious identification based upon items located within the stolen trailer after service of a search warrant. CP 3-10, RP 137.

On the first day of trial, January 4, 2006, the State amended the information to dismiss Count 17, unlawful possession of fictitious identification, and added Count 18, one count of identity theft in the second degree. CP 24-31.

After presentation of the State's case, the prosecutor moved to dismiss Counts 2, 4, 5, 6, and 13, due to the unavailability of the victims for trial. The motion was granted. RP 377-379.

When the State rested, the defense moved for a directed verdict on the remaining counts. Defense argued that in Count 1, the State had not shown knowledge that the property was stolen. In the remaining counts, defense argued that the State had not shown intent to commit a crime. RP 380-383. The motion was granted as to Counts 3, 7, 8, 9, 11, 14, and 15. RP 398-405.

The jury was asked to determine guilt on Counts 1, 12, 16 and 18. CP 65-68. The jury found defendant guilty on three charges of identity theft in the second degree on Counts 12, 16, and 18. The jury could not reach a unanimous decision on Count 1, which concerned possession of the stolen trailer. RP 462-465, CP 65-68.

Defendant was sentenced on his convictions on February 3, 2006. CP 75-85. Defendant received a standard range sentence of 48 months. CP 75-85. At that same hearing, the State "rearraigned" defendant on the only count that remained to be resolved, Count I, possession of stolen property in the first degree. 2/3/06 RP 4-5. The trial court set a pre-trial hearing for the sole unresolved count. 2/3/08 RP 16.

On March 13, 2006, the trial court signed an order of dismissal without prejudice presented by the State ("original order").¹ (Appendix A). *See also* Personal Restraint Petition. The order indicated the dismissal was for the purpose of "evaluating the feasibility of retrying the case." (Appendix A). Apparently, the clerk's office was confused, because the original order failed to specify that the dismissal was only for the unresolved count, and brought this to the attention of the State. 4/14/06 RP 2. The State, presumably after talking with the clerk's office, then presented a new order of dismissal without prejudice on April 14, 2006 ("nunc pro tunc order"). 4/14/06 RP 2, (Appendix B). *See also* State's Response to Personal Restraint Petition and Emergency Motion for Release from Illegal Confinement, Appendix B. The nunc pro tunc order was intended to fix the "inartful" language of the first order and clarify that only Count 1 (which had resulted in a hung jury at trial) was being dismissed without prejudice. 4/14/06 RP 2. The prosecution did not intend the order of dismissal to affect the other counts. 4/14/06 RP 2; CP 75-85. Defendant did not object to the entry of the nunc pro tunc order or to it being entered nunc pro tunc to the original order.² 4/14/06 RP 2.

¹ As far as the State is aware, a record of this hearing does not exist.

² There is some discrepancy in the dates. The order is "nunc pro tunc back to the date of the original order." 4/14/06 RP 2. However, the original order date was March 13th. The record reflects that the nunc pro tunc order was intended to modify the original order but the date of March 8th, 2006 is incorrect.

Defendant filed a direct appeal challenging his conviction, COA No. 34445-9-II. While his appeal was pending, defendant filed a personal restraint petition challenging his restraint under the same superior court cause number, COA 35060-2-II. Defendant also filed an “Emergency Motion for Release from Illegal Confinement” claiming that there was no authority to hold him after the original order of dismissal was entered on March 13, 2006. The Court of Appeals denied defendant’s emergency motion for release. The Court of Appeals consolidated the direct appeal and the personal restraint petition. COA Opinion, No. 34445-9-II. (*See Answer to Petition for Review, Appendix A- page 1.*)

In his direct appeal, defendant alleged ineffective assistance of counsel, lack of probable cause for his arrest, defects in the search warrant, and insufficient evidence. The Court of Appeals reviewed all of the above issues and affirmed defendant’s convictions on Counts 12 and 18, but reversed the conviction on Count 16 for ineffective assistance of counsel. COA Opinion, No. 34445-9-II. (*See Answer to Petition for Review, Appendix A- page 1.*)

In his Statement of Additional Grounds, defendant alleged insufficient evidence to convict, an illegal search and seizure, loss of physical evidence by the State, lack of testimony to prove intent, malicious prosecution, denial of a mistrial on all counts when the jury could not reach a verdict on Count 1, that the “to convict” instructions were faulty, and prosecutorial misconduct. The Court of Appeals

reviewed these issues and found that none of them required reversal. COA Opinion, No. 34445-9-II. (*See Answer to Petition for Review, Appendix A- page 13.*)

In the personal restraint petition, defendant raised the issues of insufficient evidence, denial of a mistrial on all counts when the jury could not reach a verdict on Count 1, prosecutorial misconduct, ineffective assistance of counsel, illegal search and seizure and lack of jurisdiction. The Court of Appeals considered defendant's personal restraint petition and held that petitioner was not entitled to relief and dismissed the petition. COA Opinion, No. 34445-9-II. (*See Answer to Petition for Review, Appendix A- page 15.*) In their opinion, the Court of Appeals did not specifically address defendant's allegations that jurisdiction to hold him was lost when his case was dismissed under the original order. However, the court did indicate in their facts section that, "The jury did not reach a unanimous verdict on the charge of possession of a stolen property, Count 1, and the State dismissed the charge without prejudice." COA Opinion, No. 34445-9-II. (*See Answer to Petition for Review, Appendix A- page 3.*)

The defendant petitioned this court for review. This court accepted review on the limited issue of whether a nunc pro tunc order is the proper mechanism to amend a dismissal order.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN USING A NUNC PRO TUNC ORDER TO AMEND AN ORDER OF DISMISSAL WHERE THERE WAS NO DISPUTE AMONG THE PARTIES AS TO THE INTENT OF THE ORIGINAL ORDER.

Judicial amendment can be done by way of a nunc pro tunc order, which is an inherent power of the court. *In re Marriage of Pratt*, 32 Wn. App. 665, 667, 649 P.2d 141 (1982). Nunc pro tunc orders may be used to correct "omissions from the record." *State v. Smissaert*, 103 Wn.2d 636, 640, 694 P.2d 654 (1985). It is a discretionary power that should be used when it is "consistent with the justice of a particular case." *State v. Petrich*, 94 Wn.2d 291, 296, 616 P.2d 1219 (1980), *State v. Rosenbaum*, 56 Wn. App. 407, 410, 784 P.2d 166 (1989). "A retroactive judgment is appropriate only to correct ministerial or clerical errors." *Smissaert*, 103 Wn.2d at 641. A nunc pro tunc order "may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." *Rosenbaum*, 56 Wn. App. at 411. The order can be used to correct an action taken, but not to remedy a complete omission. *Rosenbaum*, 56 Wn. App. at 411, *Smissaert*, 103 Wn.2d at 641, *Pratt*, 32 Wn. App. at 668. As the action is discretionary, it may not be "disturbed on appeal except upon a clear showing that the ruling was manifestly unreasonable." *Rosenbaum*, 56 Wn. App. 410.

Defendant has failed to show that the trial court's use of a nunc pro tunc order was manifestly unreasonable. Because the jury could not reach a unanimous decision on one count of possession of stolen property, the State was entitled to retry the count. That count remained at pre-trial status while the State contemplated their options on how to proceed on the unresolved count. Ultimately, the State chose the option of dismissing the count without prejudice in order to preserve the option of retrying the count at a later time, and presented the original order. The original order, unfortunately, caused some confusion.

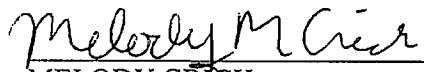
The nunc pro tunc order clarified the poorly worded original order. There is no dispute amongst the parties as to the intent behind the original order. 4/14/06 RP 2. There was no prejudice to defendant as the intent of the two documents was the same, and defendant did not object to the entry of the order. 4/14/06 RP 2. The trial court's action in entering the nunc pro tunc order was to effectuate the intent of the prior ruling. It was not "an attempt to correct judicial inaction, but instead merely allowed the record to reflect what was essentially completed judicial action." *Pratt*, 32 Wn. App. at 668. As such, there was no abuse of discretion in entering such an order.

D. CONCLUSION.

The trial court did not abuse its discretion in entering a nunc pro tunc order in these circumstances. The State asks this court to uphold the Court of Appeals' opinion affirming the convictions on Counts 12 and 18 and remanding Count 16 back to the trial court for further proceedings.

DATED: August 29, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

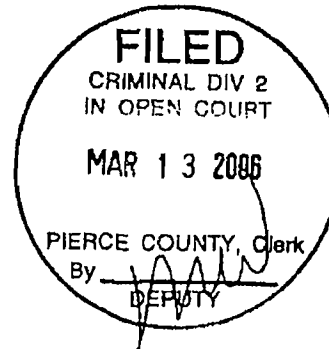
8/29/08 
Date Signature

APPENDIX “A”

Order of Dismissal 3/13/06



04-1-04088-6 26752532 ORDSMWO 01-04-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY JAN - 4 2007

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04088-6

vs.

KEVIN LAWRENCE HENDRICKSON,

Defendant.

MOTION AND ORDER FOR
DISMISSAL WITHOUT PREJUDICE

DOB: 02/21/55

SID #: WA10188398

MAR 15 2006

MOTION

Comes now the plaintiff, herein, by its attorney, GERALD A. HORNE, Prosecuting Attorney for Pierce County, and moves the court for an order dismissing without prejudice the above entitled action, on the grounds and for the reason that the State is currently evaluating the feasibility of retrying this case at this time.

DATED: this 13th day of March, 2006

GERALD A. HORNE

Pierce County Prosecuting Attorney

by: [Signature] #17592 per

KAREN D. PLATT

Deputy Prosecuting Attorney

WSB#: 17290

MOTION AND ORDER FOR
DISMISSAL -1
jedismiss.dot

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Office of the Prosecuting Attorney
Telephone: (253) 798-7400
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

04-1-04088-6

ORDER

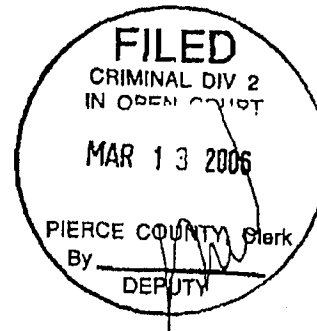
The above entitled matter having come on regularly for hearing on motion of GERALD A. HORNE, Prosecuting Attorney, and the Court being fully advised in the premises, it is hereby;

ORDERED that the above entitled action be and same is hereby dismissed without prejudice, bail is hereby exonerated.

DATED the 13th day of March, 2006.

JUDGE
FRANK E. CUTHBERTSON

kdp

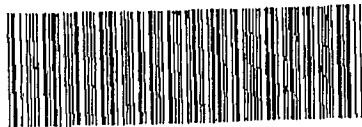


MOTION AND ORDER FOR
DISMISSAL -2

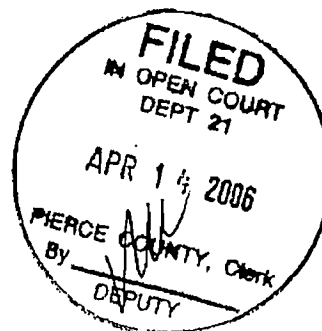
Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Office of the Prosecutor
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

APPENDIX “B”

Order of Dismissal 4/14/06



04-1-04088-6 25309590 ORDSM 04-18-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04088-6 APR 18 2006

vs.

KEVIN LAWRENCE HENDRICKSON,

MOTION AND ORDER FOR
DISMISSAL WITHOUT PREJUDICE

Defendant.

DOB: 02/21/55

SID #: WA10188398

MOTION

Comes now the plaintiff, herein, by its attorney, GERALD A. HORNE, Prosecuting Attorney for Pierce County, and moves the court for an order dismissing Count I without prejudice the above entitled action, on the grounds and for the reason that the state anticipates that some counts will be retired after appeal and this count can be refiled at the same time.

DATED: this 14th day of April, 2006

*none pro tunc to
March 8-2006*

GERALD A. HORNE
Pierce County Prosecuting Attorney
by: [Signature]

KAREN D. PLATT
Deputy Prosecuting Attorney
WSB#: 17290

MOTION AND ORDER FOR
DISMISSAL -1
jsdizmiss.dot

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

04-1-04088-6

ORDER

The above entitled matter having come on regularly for hearing on motion of GERALD A. HORNE, Prosecuting Attorney, and the Court being fully advised in the premises, it is hereby;

ORDERED that Count I of the above entitled action be and same is hereby dismissed *w/out* ~~without~~ prejudice, bail is hereby exonerated.

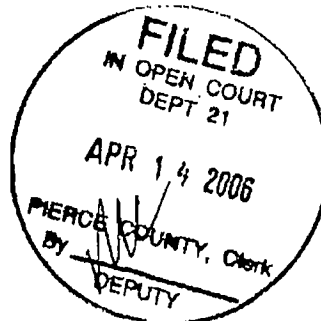
DATED the 14th day of April, 2006.

Nunc pro tunc to 3-8-06

Frank Cuthbertson

JUDGE

kdp



MOTION AND ORDER FOR
DISMISSAL -2
jsdismiss.dot

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400